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IN THE

Supreme Court of the United States

October Term, 1981

No. 81-2348

AETNA LIFE AND CASUALTY COMPANY,

Petitioner,

against

MORRIS C. GURNEE,

Respondent.

STATE WIDE INSURANCE COMPANY, *et al.*,

Petitioners,

against

MOSHE WEINREICH, and all others similarly situated,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE NEW YORK COURT OF APPEALS

RESPONDENTS' BRIEF IN OPPOSITION

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Questions Presented

1. (a) Whether any substantial federal question is raised under the due process clause, where the New York State Court of Appeals first interprets a state statute dictating the terms of New York No-Fault automobile insurance contracts, thereby overruling a state regulatory agency's invalid interpretation of that statute upon which Petitioners claim to have relied, and where the Court of Appeals then applies its interpretive decision to contracts written after the effective date of the statute but before the decision.

   (b) Assuming *arguendo* that the foregoing acts of the New York Court of Appeals may result in a denial of due process in some circumstances, whether any substantial federal question warranting review by this court is presented by this record which is devoid of evidence that Petitioners have been injured by reason of that due process violation.

2. Whether any substantial federal question under the contract clause is raised where New York's highest court interprets the terms of a contract contrary to the understanding of one party who acted in reliance on his mistaken reading of the contract.

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Contents	ii
Table of Authorities	iii
Counterstatement of The Case	2
Reasons Why The Writ Should Be Denied	7
Summary of Argument	7
1. (a) There Is Neither A Due Process Violation, Nor A Taking Of Property For Public Use Without Just Compensation, When Parties To A Contract Are Obliged to Fulfill Their Commitments	9
(b) No Substantial Federal Due Process Claim Is Stated Because the Record Does Not Establish that Petitioners Were Injured By Reason Of Any Of The Events They Complain Of	12
2. The Impairment Of Contracts Clause Is Not Violated By State Judicial Decisions	16
CONCLUSION	19

TABLE OF AUTHORITIES

CASES:

A. M. Klemm & Sons v. *City of Winter Haven*, 309 U.S. 638, 60 S. Ct. 810, 84 L.Ed. 993 (1940)	18
Atlantic Coast Line R.R. v. *Florida*, 295 U.S. 301, 55 S. Ct. 713, 79 L.Ed. 1451 (1935)	11
Board of Regents v. *Roth*, 408 U.S. 564, 92 S. Ct. 2701, 33 L.Ed.2d 548 (1972)	13
Bouie v. *City of Columbia*, 378 U.S. 347, 84 S. Ct. 1697, 12 L.Ed.2d 894 (1964)	12
Brinkerhoff-Faris Trust & Savings Co. v. *Hill*, 281 U.S. 673, 50 S. Ct. 451, 74 L.Ed. 1113 (1930)	8,9, 11,12
Chevron Oil Co. v. *Huson*, 404 U.S. 97, 90 S. Ct. 349, 30 L.Ed.2d 296 (1971)	6

Page

CASES (Continued):

City of Los Angeles Dep't of Water & Power v. *Manhart*, 435 U.S. 702, 98 S. Ct. 1370, 55 L.Ed.2d 657 (1978) 10

Cross Lake Shooting & Fishing Club v. *Louisiana*, 224 U.S. 632, 32 S. Ct. 577, 56 L.Ed. 924 (1912) 16

Douglas v. *Pike County*, 101 U.S. 677, 25 L.Ed. 968 (1879) 17

Erie R.R. v. *Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L.Ed. 1188 (1938) 17

Gelpke v. *City of Dubuque*, 68 U.S. (1 Wall) 175, 17 L.Ed. 520 (1863) 17

Government Insurance Co. v. *Sparrow*, 66 App. Div.2d 782, 410 N.Y.S.2d 657 (2d Dep't 1978) 4

Great Northern Railway Co. v. *Sunburst Oil & Refining Co.*, 287 U.S. 358, 53 S. Ct. 145, 77 L.Ed. 360 (1932) 9

Hibbard, Spencer, Bartlett & Co. v. *City of Chicago*, 308 U.S. 505, 60 S. Ct. 114, 84 L.Ed. 433, (1939) 18

Jeffries v. *Turkey Run Consolidated School District*, 492 F.2d 1 (7th Cir. 1974) 13

Kurcsics v. *Merchants Mutual Insurance Co.*, 93 Misc.2d 281, 402 N.Y.S.2d 763 (Sup. Ct. Erie Co. 1978) 4

Kurcsics v. *Merchants Mutual Insurance Co.*, 49 N.Y.2d 451, 426 N.Y.S.2d 454, 403 N.E.2d 159 (1980) 5,6 7,8,13,14,16

Linda R.S. v. *Richard D.*, 410 U.S. 614, 93 S. Ct. 1146, 35 L.Ed.2d 536 (1973) 13

Mariniello v. *Shell Oil Co.*, 511 F.2d 853 (3rd Cir. 1975) 16

Matter of Rizzo, New York Law Journal, July 6, 1978 (Sup. Ct. Suffolk Co.) 5

Montgomery v. *Daniels*, 38 N.Y.2d 41, 378 N.Y.S.2d 1, 340 N.E.2d 444 (1975) 2,5

Page

CASES (Continued):

Patterson v. *Colorado*, 205 U.S. 454, 27 S. Ct. 556, 51 L.Ed. 879 (1907) 10

Raley v. *Ohio*, 360 U.S. 423, 79 S. Ct. 1257, 3 L.E.2d 1344 (1959) 12

Secor v. *Fulton*, 293 U.S. 517, 55 S. Ct. 574, 79 L.Ed. 1533 (1934) 18

State Farm Mutual Automobile Insurance Companies v. *Brooks*, 78 App. Div.2d 456, 435 N.Y.S.2d 419 (4th Dep't 1981) 2

Stockholders of Peoples Banking Co. v. *Sterling*, 300 U.S. 175, 57 S. Ct. 386, 81 L.Ed. 59 (1937) 16

Tidal Oil Co. v. *Flanagan*, 263 U.S. 444, 44 S. Ct. 197, 68 L.Ed. 382 (1924) 9,18

United States v. *Bensinger*, 507 F.2d 103 (7th Cir. 1974) 10

United States v. *Dillon*, 346 F.2d 633 (9th Cir. 1965) 8,9

Woodall v. *Keller*, 357 F. Supp. 595 (D. Md. 1972) 10

Worth v. *Seldin*, 422 U.S. 490, 95 S. Ct. 2197, 45 L.Ed.2d 343 (1975) 13

Page

CONSTITUTIONAL PROVISIONS:

United States Constitution

Article 1, Section 10 ..... 6,7, 8,16,17

Amendment V 6,7, 8,9,12,13

Amendment XIV 6,7, 8,9,10,11,12,13

STATUTES:

Judicial Code

28 U.S.C. § 1652 17

New York Insurance Law [Comprehensive Automobile Insurance Reparations Act], Article 13, vol. 27 McKinney's Consolidated Laws of New York (1966 ed., 1981-1982 pocket part) 2

§ 176(1) 14

§ 183(1)(d) 13

§ 671 6

§ 671(1)(b) 3,4

§ 671(2)(a) 3,4

§ 671(4) 2

§ 672(1) 6

§ 672(3) 2

§ 676 2

§ 677(1) 2,15

§ 677(3) 2,15

§ 677(5) 3,13, 14,15

REGULATIONS:

New York Insurance Regulation

11 NYCRR 65.6(n)(2)(xi) 4

11 NYCRR 65.15(n)(2)(xi) 4

OTHER AUTHORITIES:

McKinney's Sessions Laws of New York, vol. 2 (1973), p. 2335 2

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents Morris C. Gurnee and Moshe Weinreich on behalf of themselves and all others similarly situated respectfully request that this Court deny the Petition for Writ of Certiorari seeking review of the decision of the Court of Appeals of the State of New York in this case.

Counterstatement of The Case

On February 13, 1973, the New York State Legislature enacted the Comprehensive Automobile Insurance Reparations Act, Article 13 of the Insurance Law [L. 1973, c. 13; 27 McKinney's Consolidated Laws, §§ 670-678] commonly known as the No-Fault law, which became effective on February 1, 1974. The Act, while curtailing to a certain extent the common law right of injured motorists and other covered persons to recover damages for pain and suffering except in the case of "serious" injuries [*see* Insurance Law § 671(4)], was designed primarily to "assure prompt and full compensation to accident victims of substantially all their economic loss without regard to fault" [2 McKinney's Session Laws of New York, 1973, p. 2335; *State Farm Mutual Automobile Insurance Companies* v. *Brooks*, 78 App. Div. 2d 456, 435 N.Y.S.2d 419 (4th Dep't 1981)], in exchange for limiting their common law rights. Another purpose of the law was reduction of the cost of automobile insurance premiums. *Montgomery* v. *Daniels*, 38 N.Y.2d 41, 62, 378 N.Y.S.2d 1, 19, 340 N.E. 2d 444 (1975).

In effectuating the legislative purpose to reduce insurance premiums Insurance Law Section 676 mandates that each insurer's initial insurance premiums under No-Fault be at least 15% less, or if a $200 deductible is included,* 20% less than that insurer's premiums for such coverage was on January 1, 1973. Insurance Law Section 677(1) provides that no rate can be made effective until it has been approved by the Superintendent of the Department of Insurance. Section 677(3) provides that between February 1, 1974, the effective date of the statue, and subsequent dates (which have ultimately been extended to December 31, 1983), the approval of the Superintendent is required

* The Act mandated the provision of a $200.00 deductible option [Insurance Law Section 672(3)].

for all premium rate changes resulting in an increase in such rates above the previously approved level.* Section 677(5) provides for the establishment of procedures for the reimbursement to policy holders of "excess" profits of insurers attributable to No-Fault policies.

The No-Fault law commands that automobile accident insurance policies issued in New York State provide that covered persons (operators, passengers and pedestrians, and motorcyclists up to December 1, 1977) who are injured in accidents involving the operation of insured motor vehicles, be paid 80% of gross lost earnings, with a maximum benefit of $1,000.00 per month, for periods of disability up to three years from the date of the accident causing the injury [Insurance Law, Sections 671(1)(b), 671(2)(a)]. Section 671(1)(b) defines lost earnings as:

> Loss of earnings from work which the injured person would have performed had he not been injured, and reasonable and necessary expenses incurred by such person in obtaining services in lieu of those that he would have performed for income, up to $1,000.00 per month for not more than three years from the date of the accident causing the injury.

Section 671(2) reads:

> "First party benefits" means payments to reimburse a person for basic economic loss on account of personal injury arising out of the use or operation of a motor vehicle, less; . . .
>
> (a) 20% of lost earnings pursuant to paragraph (b) of subdivision (1) of this section.

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* An approved rate could be lowered and then returned to its previous level without the need for new approval, but could not go above its highest previously approved level without review by the Superintendent.

Both before and after the effective date of the No-Fault law, uncertainty existed among the insurance community, the public and the judiciary* as to the effect, if any, of Section 671(2)(a)'s 20% reduction on the $1,000.00 monthly maximum provided for in Section 671(1)(b). Industry spokesmen frankly acknowledged that the language of the No-Fault law was less than clear. One insurance industry representative stated at public hearings before the Insurance Department: "as our first speaker mentioned, there is some ambiguity in the statute" [Appellant's Appendix in the New York Court of Appeals, pp. A287-A288**]. On January 25, 1974, seven days before the No-Fault law took effect, the New York State Department of Insurance issued an interpretive regulation stating that the maximum lost earnings benefit would be $800.00 per month ["Regulations Interpreting The Comprehensive Automobile Insurance Act," 11 NYCRR 65.6(n)(2)(xi), continued in 11 NYCRR 65.15(n)(2)(xi) as to accidents occurring on December 1, 1977 and after, reproduced at Petitioners' Appendix of Constitutional, Statutory and Regulatory Provisions, p. 20s]. However, the language of the standard policy continued to reflect the statutory mandate.*** Thereafter arbitrations of no-fault claims sometimes followed the interpretive regulation and sometimes

*Compare *Kurcsics* v. *Merchants Mutual Insurance Co.*, 93 Misc.2d 281, 402, N.Y.S.2d 763 (S. Ct. Erie Co. dec. February 28, 1978) (No fault claimants entitled to $1,000.00 lost earnings benefits) *with Government Insurance Co.* v. *Sparrow*, 66 App. Div. 2d 782, 410 N.Y.S.2d 657 (2d Dep't 1978) ($800.00 is maximum under statute).

** All documents referred to herein which are part of the record below will be provided to the Court on request.

*** Petitioners have failed to include a copy of the standard No-Fault policy in the record here as well as in the state courts. They have included copies of a brochure and policy cover letter [Appendix to the Petition, pp. A50a and A51a (hereinafter "A___a")] which refer to an $800.00 maximum. The policies themselves, however, two samples of which appear at pp. AA32 to AA35 of the appendix of the *Amici* in the Court of Appeals, read: "Work loss shall consist of the sum of the follcwing losses and expenses, up to $1,000.00 per

applied a $1,000.00 maximum lost earnings recovery, the Insurance Department Regulations notwithstanding [*See* Appendix of Samuel Uretsky, *et al., Amici Curiae* in the New York Court of Appeals, pp. AA80-AA113]. Arbitral decisions upholding the $1,000.00 figure were affirmed by the courts. *See, e.g., Matter of Rizzo,* New York Law Journal, July 6, 1978 (Sup. Ct. Suffolk Co.) [reproduced at *id.,* p. AA23].

In *Montgomery* v. *Daniels, supra,* the case in which the New York Court of Appeals affirmed the constitutionality of the No-Fault law, the court observed in *obiter dictum* that

> [c]ompenstion for basic economic loss is payable as "first party benefits" after reducing the *gross amount of such loss* by deducting (a) 20% of "lost earnings" . . .

38 N.Y.2d at 46-47; 378 N.Y.S.2d at 5 (emphasis added). This *dictum* foreshadowed the holding in *Kurcsics* v. *Merchants Mutual Insurance Company,* 49 N.Y.2d 451, 426 N.Y.S.2d 454, 403 N.E.2d 159 (1980), where in similar language* the Court of Appeals, construing the statute for the first time, held that the Insurance Department's interpretation of the statute, limiting to $800.00 the maximum lost earnings benefits, was of no force and effect as being contrary to the meaning of the No-Fault statute. The

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month for a period of three years from the date of the accident: . . ." Paralleling the Insurance Law provisions themselves, a subsequent paragraph refers to the 20% deduction from lost earnings but the contract is silent as to whether or not the deduction related to the $1000.00 maximum figure.

* The court wrote:

> [p]laintiff forwards as the reasonable and correct interpretation of these statutory provisions, that the 20% deduction was intended to be computed *against the gross amount of lost earnings* claimed. . . . We agree with this contention.

49 N.Y.2d at 456-457, 426 N.Y.S.2d at 446 (emphasis added).

court held that the proper maximum benefit for lost earnings was $1,000.00 per month. *Kurcsics'* interpretation of the meaning of Insurance Law Section 671 was the first construction by a court of last resort of the statutory language incorporated in all No-Fault insurance policies [see Insurance Law § 672(1)] previously issued in the State of New York.

After *Kurcsics,* Respondents brought the instant actions below. They argued that *Kurcsics'* interpretation of the Insurance Law, and hence of their insurance contracts, should be applied to them so as to entitle them to payments equalling $1,000.00 per month for lost wages, rather than the $800.00 previously paid. On February 18, 1982, the New York Court of Appeals unanimously held that *Kurcsics* should be given retroactive effect [A28a]. Analyzing the factors set forth in *Chevron Oil Co.* v. *Huson,* 404 U.S. 97, 106-107, 90 S. Ct. 349, 30 L.Ed.2d 296 (1971), to determine whether a ruling should be retroactive, the unanimous court held that *Kurcsics* had been foreshadowed and did not establish a new principle of law; that retroactive application of *Kurcsics* would further the purposes of the No-Fault legislation by insuring that persons injured in automobile accidents covered by No-Fault would receive *prompt and full* compensation of economic losses; and, that balancing the equities and the effect of retroactive application on Petitioners and Respondents, the equities favored retroactivity [A30a-A33a]. The Court of Appeals further held without dissent that retroactive application of *Kurcsics* did not infringe the contract clause of the United States Constitution [Article 1, Section 10], because judicial construction of a state statute cannot by its nature constitute a "law impairing the obligations of contract." It further held that retroactive application was not an unconstitutional taking of property without due process because it was merely a function of its interpretation in 1980 of a statute

enacted in 1974 and insurance policies written thereafter pursuant to statutory mandate [A33a].

The instant Petition seeks review of the New York Court of Appeals' determination on those constitutional issues.

REASONS WHY THE WRIT SHOULD BE DENIED

Summary of Argument

In making its determination as to retroactivity or non-retroactivity, the New York court applied equitable and not constitutional principles—a classic state court function. It did this in the context of a case involving the interpretation of a state statute in a state regulated industry, applying an equitable balancing of the financial consequences of its decision. There is no federal question here.

Petitioners' claim of deprivation of property without due process or for public use without just compensation relates to the retroactive payments for lost earnings which the decision below will compel them to make and for which they claim they were unable to charge adequate premiums [Petition, pp. 9-10]. The allegation of injury is bottomed on their claim that they will be deprived of the right to recoup any retroactive payments by factoring such payments into future premium rate increase requests [Petition, p. 13]. Petitioners' claim under the contract clause is simply that their contracts called for a maximum lost earnings payment of $800.00 and to now compel them to pay more would constitute an impairment of their contracts [Petition, p. 15]. Because none of those contentions has merit, no substantial federal question is raised and therefore the writ should be dismissed.

There was no due process violation below. The New York Court of Appeals in *Kurcsics* merely construed a New York statute whose meaning was presented to that court for the first time after several *nisi prius* and intermediate appellate courts had disagreed as to its meaning. Whether

the maximum payment for lost earnings was $800.00, or more, up to $1,000.00 per month, depended on the interpretation of the statute. In the instant cases the issue was whether equity required that Petitioners be held to their contracts as the Court of Appeals had interpreted them in *Kurcsics*, or relieved of their statutory and contractual obligation. The Court held, *inter alia*, that because its *Kurcsics* ruling had been foreshadowed, equity required that insurance claimants receive the full benefits which the legislature intended them to have. Thus, the decision below merely obliged Petitioners to comply with their agreements. As the New York Court of Appeals held, no due process violation was occasioned thereby. *See Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U.S. 673, 50 S. Ct. 451, 74 L.Ed.2d 1113 (1930); *U.S.* v. *Dillon*, 346 F.2d 633 (9th Cir. 1965).

Moreover, the writ should be denied because the record indicates that Petitioners have not suffered the injury they allege. They have not shown that a vested property right has been impaired. Thus, no violation of their constitutional rights is stated. Since further state administrative and judicial procedures must take place before Petitioners' right to apply for recoupment can be vindicated or denied, their resort to certiorari is premature. Petitioners' bare claim that future recoupment of moneys they have been ordered to pay is not possible is utterly unsupported by the record. In addition, the statutory-regulatory scheme designed to reduce No-Fault insurance premiums gave them no assurance of premium rate increases in any event. Thus, Petitioners have not shown, and cannot show on this record, that they were deprived of property in violation of due process or for public use without just compensation.

As to Petitioners' contract clause claim, they have failed to cite persuasive authority for the change in settled law they seek when they request this Court to hold a retroactive decision of a state court interpreting a state statute violative of the contract clause of the federal constitution.

1. (a) There Is Neither A Due Process Violation Nor A Taking Of Property For Public Use Without Just Compensation, When Parties To A Contract Are Obliged To Fulfill Their Commitments.

It is not a taking of property without just compensation or a deprivation in contravention of due process to hold the insurance companies to their contractual obligation to pay $1,000.00 in monthly No-Fault lost earnings benefits.

> A Fifth Amendment "taking" does not occur when the state simply requires an individual to fulfill a commitment he had made.

U.S. v. *Dillon*, 346 F.2d 633, 638 (9th Cir. 1965).*

Moreover, the law is equally clear that a judicial decision retroactively applied does not amount to an unconstitutional deprivation of property without due process of law. As this court has stated:

> The mere fact that a state court . . . has overruled principles or doctrines established by previous decision *on which a party relied* does not give rise to a claim under the Fourteenth Amendment.

Brinkerhoff-Faris Trust and Savings Co. v. *Hill*, 281 U.S. 673, 680, 50 S. Ct. 451, 454, 74 L.Ed. 1113 (1930) (emphasis added). *Accord, Great Northern Railway Co.* v. *Sunburst Oil & Refining Co.*, 287 U.S. 358, 361, 364, 53 S. Ct. 145, 147, 148, 77 L.Ed. 360 (1932); *Tidal Oil Co.* v. *Flanagan*, 263 U.S. 444, 450, 44 S. Ct. 197, 198, 68 L.Ed.

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* *Dillon* involved the question whether an attorney's services, i.e., his property, was taken without just compensation when a court directed him to represent an indigent criminal defendant. In view of the clear duty of the state to provide counsel to such defendants, it was not questioned in *Dillon* that if there had been an improper "taking" it was for a "public use" [U.S. Const., Am. V]. In the case at bar, by contrast, the Fifth Amendment provision that private property shall not "be taken *for public use*, without just compensation" [emphasis added], certainly cannot have been violated by the Court of Appeals' definition of the contractual-financial obligations existing between Petitioners and Respondents. That decision involved neither a "taking" nor a "public use."

382 (1924); *Patterson* v. *Colorado*, 205 U.S. 454, 461, 27 S. Ct. 556, 557, 51 L.Ed. 879 (1907); *United States* v. *Bensinger*, 507 F.2d 103, 104 (7th Cir. 1974); *Woodall* v. *Keller*, 357 F. Supp. 595, 596-97 (D. Md. 1972). If a state high court may reverse its own prior decision on which reliance was based without infringing the due process clause, *a fortiori* reliance on an administrative regulation which is later invalidated by a state court, as occurred below, presents no greater constitutional claim.

The petitioning insurance companies thus had no vested right in their interpretation that $800.00 per month was the statutory maximum, even taking into account the Insurance Department regulation to that effect. The due process clause does not shield Petitioners from the risk that a state court of last resort would disagree with that reading of the No-Fault law, and that there might thus result an imbalance between premium rates and policy benefits. Any party to a contract who withholds a payment due under the terms of the contract based on his construction of the document, always faces the risk that a court of last resort might interpret the contract contrary to his expectations.*

The cases relied on by Petitioners in asserting the existence of a substantial due process violation are not compelling. While *City of Los Angeles Dep't of Water and Power* v. *Manhart*, 435 U.S. 702, 98 S. Ct. 1370, 55 L.Ed.2d 657 (1978), indicates that the impact of retroactive judicial rulings on insurance funds must be carefully considered [435 U.S. at 721; 98 S. Ct. at 1382], this court

* Furthermore, Petitioners chose to live with the ambiquity rather than seek a declaration of the statute's true meaning from the New York courts, and thereby kept for themselves the benefit of the use of the funds that they did not pay out for up to eight years. It is neither inequitable nor punitive, nor would it violate due process as they now claim [Petition, p. 13], to subject them to the statutory 2% per month interest on the money they withheld from No-Fault claimants, particularly in an era of high interest rates.

there indicated that in assessing the availability of retroactive relief the equities must be weighed on a case by case basis [435 U.S. at 718-719, 723; 98 S. Ct. at 1380, 1383]. The New York Court of Appeals so analyzed the case below, considering, *inter alia*, the differing economic impact of retroactivity on each party and concluding that in this case, the equities favored retroactivity [A32a-A33a]. Petitioners have not challenged the standards or analysis by which the New York Court of Appeals reached that determination.

In *Atlantic Coast Line R.R.* v. *Florida*, 295 U.S. 301, 55 S. Ct. 713, 79 L.Ed. 1451 (1935), this court refused to order the return of tariffs collected under *voidable* regulations whose validity was ultimately upheld. That case does not support Petitioners' proposition that they should not be required to disburse retroactively funds they improperly failed to pay out in reliance on the *void* regulations of the Insurance Department at bar. In addition, the *Atlantic Coast Line R.R.* determination not to order reimbursement was based on the limited, prospective powers of the Interstate Commerce Commission and not at all on constitutional principles [295 U.S. at 311; 55 S. Ct. at 717]. Moreover, the phrase quoted by Petitioners [Petition, p. 11] observing the plight of the carrier who was "not at liberty to take the law into its own hands and refuse submission to the order [of the agency] . . ." was applied in *Atlantic Coast Line R.R.* in its analysis of whether *in that case, equity* required retroactivity [295 U.S. at 310-311; 55 S. Ct. at 717]. As stated, the New York Court of Appeals has considered the equitable aspects of this case and found against Petitioners.

In *Brinkerhoff-Faris Trust and Savings Co.* v. *Hill, supra*, this court held that Federal due process rights may occasionally be violated by state judicial actions [281 U.S. at 679-680; 50 S. Ct. at 454], but it referred to procedural due process. There, in a classic Catch-22 decision, the

Missouri Supreme Court had affirmed denial of equitable relief by reason of laches, and upheld a tax assessment against Brinkerhoff-Faris, because they had failed to pursue administrative remedies before the State Tax Commission which, under precedents in effect until that very case, had been held not to exist. This Court held that "the practical effect of the judgment of the Missouri Court is to deprive the plaintiff of property without affording it *at any time* an opportunity to be heard in its defense" [281 U.S. at 678-679; 50 S. Ct. at 453]. That type of denial of procedural due process does not exist here. Petitioners herein had their forum and fair hearing in the New York courts in *Kurcsics* and the instant case. *Brinkerhoff-Faris* expressly noted that every overruling of precedent by a state court does not a due process claim make [281 U.S. at 680; 50 S. Ct. at 454, quoted *supra*, p. 9], and Petitioners' due process rights were not violated herein.

Finally, *Raley* v. *Ohio*, 360 U.S. 423, 79 S. Ct. 1257, 3 L.Ed.2d 1344 (1959), and *Bouie* v. *City of Columbia*, 378 U.S. 347, 84 S. Ct. 1697, 12 L.Ed.2d 894 (1964) were criminal matters involving vastly different and constitutionally more sensitive retroactivity considerations than the case at bar. *See Bouie* v. *City of Columbia, supra*, 378 U.S. at 352; 378 S. Ct. at 1702.

(b) No Substantial Federal Due Process Claim Is Stated Because The Record Does Not Establish That Petitioners Were Injured By Reason Of Any Of The Events They Complain Of.

Petitioners allege that because they will be deprived of the right to obtain a premium rate increase to recoup the lost earnings benefits they have been ordered to pay pursuant to their New York No-Fault contracts, the decision below deprives them of property without just compensation and in violation of due process [Petition, pp. 9-10, 13]. It is axiomatic that unless some impairment of Petitioners'

vested property rights is established, no claim of unconstitutional taking or violation of due process is stated. *See, e.g., Board of Regents* v. *Roth,* 408 U.S. 564, 569, 92 S. Ct. 2701, 2705, 33 L.Ed.2d 548 (1972); *Jeffries* v. *Turkey Run Consolidated School District,* 492 F.2d 1, 3 (7th Cir. 1974). Petitioners have not demonstrated that they may not recoup and thus have not shown that the constitutional rights they invoke have been violated.*

The relevant statutes indicate that the Insurance Department has authority to take appropriate action to provide for recoupment of losses resulting from retroactive application of *Kurcsics* if equity so requires. Furthermore, notwithstanding Petitioners' claim, the record does not establish, nor even support, the contention that they have ever had an absolute right to a rate increase, of which they have been deprived.

Petitioners have based their argument that they would not be entitled to recoupment on Sections 183(1)(d) and 677(5) of the New York Insurance Law.** However, neither of these statutes contains language foreclosing an insurance company from seeking a rate adjustment to compensate for paying out in any year benefits resulting from retroactive application of a decision invalidating an Insurance Department regulation which the company was required to follow. Section 183(1)(d) merely lists various factors to be considered in formulating rates, including "the past and prospective loss experience," "a reasonable profit,"

*Otherwise stated, unless and until it is established that Petitioners have been deprived of a vested right to recoup, the instant case is not ripe for consideration by this court of the grounds raised in the Petition. *Cf. Worth* v. *Seldin,* 422 U.S. 490, 499 n. 10 and accompanying text, 95 S. Ct. 2197, 2205, 45 L.Ed.2d 343 (1975); *Linda R.S.* v. *Richard D.,* 410 U.S. 614, 617, 93 S. Ct. 1146, 35 L.Ed.2d 536 (1973).

**See *e.g.,* Affidavit of Robert James Young, Jr. in support of Petitioners' motion below to dismiss the complaint, reproduced in Appellant's Appendix in the New York Court of Appeals, pp. A102-A105 at ¶¶5 and 7.

and "past and prospective expenses. . . ." Section 677(5) requires the Superintendent to establish a plan for refunding to the purchasers of No-Fault insurance policies "their share of the insurer's excess profit, if any, on such policies." Section 677(5) states that such a plan must take into consideration "the fact that losses or profits below a reasonable average profit will not be recouped from such policyholders." However, that language does not address a situation where, as here, insurance company "losses" resulted not from the company's underestimates of claims or expenses, but rather from compliance with an Insurance Department regulation subsequently held invalid.

In their joint affidavit below, on behalf of the Insurance Department of New York State* which appeared as *amicus* in support of Petitioners' motion to dismiss the complaint, Stanley A. Dorf and Milton L. Freedman do not state that there is any statutory prohibition disallowing recoupment of benefits paid out as a result of a retroactive application of *Kurcsics*. Rather, they state only that "under long-established principles of insurance rate making, insurers may not recoup losses by assessing either their past, present or future policy holders." But this does not necessarily refer to applications for premium increases. Such a general principle may not apply in the situation here, where the expenditures were not losses but ordinary benefit payments previously withheld as the result of mandatory compliance with Insurance Department regulations ultimately determined to be invalid. This conclusion is supported by the legislature's express declaration of policy that "[r]ates shall not be . . . inadequate, unfairly discriminatory, . . . or detrimental to the solvency of insurers" [Insurance Law Section 176(1)]. Allowing a rate adjustment if equity requires would be fair and proper.

* Appellant's Appendix in the New York Court of Appeals, pp. A258-A277 at A273.

In light of the foregoing, the proper channel for presentation of the instant claim in a way which might raise constitutional issues, would be for Petitioners to petition the Superintendent of Insurance for an adjustment of rates to compensate for the impact of any payments ordered in this action, receive a denial of such petition, bring appropriate judicial proceedings in the New York courts to review and then, after final New York appellate action denying their claim, file for certiorari, if there is a constitutional basis.

Petitioners cannot claim that they have been injured by the decision below until such state procedures have been followed. Only when that has happened may they assert their challenge based on the alleged existence of the "long-established principles of insurance rate making," referred to above. Here they are improperly challenging a decision of New York's Court of Appeals interpreting a law of the state, before a showing that they have sustained constitutionally recognized injury.

Petitioners' claims that New York has deprived them of their alleged existing rights to rate increases by forcing them to conform their benefit structure to the void Insurance Department regulation and then retroactively altering the benefit structure to their detriment, are utterly unsupported. While Respondents were certainly financially prejudiced to the tune of up to $200.00 per month in heretofore withheld reimbursements for lost earnings, all the law ever assured Petitioners was an opportunity to *request* premium increases; not an absolute right to their award. *That* ultimate decision is in the Superintendent's discretion [Insurance Law Section 677(3)]. In view of the legislative purpose to reduce premiums, and its commands that initial No-Fault premiums be reduced by 15% to 20% below previous premiums [Insurance Law Section 677(1)] and that losses or less than reasonable average profits arising out of No-Fault may not be a basis for recoupment from

policyholders [Insurance Law Section 677(5)], it is improbable at best that the increased insurance company payouts which would have been attributable to a $1,000.00 rather than an $800.00 maximum lost-earnings recovery would have generated an exercise of discretion by the Superintendent to permit increased premiums. Thus, it is not established on this record that reliance on the void Insurance Department Regulation caused Petitioners any injury at all. Consequently, they present no compelling claim of violation of their constitutional rights worthy of this court's attention at this juncture.

2. The Impairment of Contracts Clause Is Not Violated By State Judicial Decisions.

Petitioners assert that their insurance contracts would be impaired if the decision of the New York Court of Appeals is permitted to stand and they are compelled to pay $1,000.00 in no-fault benefits to pre-*Kurcsics* accident victims, when they had calculated premiums based on the assumption that $800.00 would be the maximum amount payable. This claim, as the New York Court of Appeals unanimously held, has no merit.

Article I, Section 10 of the United States Constitution is expressly addressed to legislative action. It commands that "[n]o state shall . . . *pass any* . . . *law* impairing the obligation of contracts." (Emphasis added). Legislatures "pass" laws; courts do not. Thus, the authorities are legion that no federal question is raised by a determination of a state court under a *pre-existing* statute even if it erroneously impairs the obligations of a contract. *See, e.g., Cross Lake Shooting and Fishing Club* v. *Louisiana,* 224 U.S. 632, 638, 32 S. Ct. 577, 579, 56 L.Ed. 924 (1912); *Stockholders of Peoples Banking Co.* v. *Sterling,* 300 U.S. 175, 182, 57 S. Ct. 386, 390, 81 L.Ed. 59 (1937). The Third Circuit Court of Appeals most recently so held in *Mariniello* v. *Shell Oil Co.,* 511 F.2d 853, 859 (3rd Cir. 1975). Rejecting a contract-clause challenge, that court

upheld the retroactive application of a New Jersey Supreme Court ruling which held invalid on state public policy grounds termination-at-will clauses in gasoline station franchises and leases. If a judicial determination striking an unambiguous contract provision is not an impairment, *a fortiori* a judicial interpretation defining a disputed term is not an impairment. Indeed, acceptance of Petitioners' argument would preclude all judicial review of disputed contracts, since any determination in favor of one party would necessarily affect the contractual expectations of the other party.

Lacking direct authority for their claim, Petitioners' only argument is that these rules are now of doubtful validity [Petition, pp. 16-17]. They pass over into an entirely different and inapplicable frame of reference and cite by way of analogy cases interpreting the Rules of Decision Act [Judiciary Act of 1789, 28 U.S.C. § 1652] as including state judicial decisions among the sources of state law to which federal courts must give deference in appropriate situations (such as diversity cases). The Act provides, however, that "[t]he laws of the several states, *except where the constitution* or treaties of the United States or Acts of Congress *otherwise require or provide*, shall be regarded as rules of decision . . .". Petitioners invoke *Erie R.R.* v. *Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L.Ed. 1188 (1938) because it defined the Act's "laws" to include judicial decisions. With respect to the impairment of contract issue at bar, the constitution has "otherwise provided." The United States Constitution Article 1, Section 10 expressly requires states only to refrain from *passing* laws impairing the obligations of contracts. Acts of state courts are not within its purview. Therefore, *Erie* and The Rules of Decision Act have no application at bar.

Petitioners also cite *Gelpcke* v. *City of Dubuque*, 68 U.S. (1 Wall.) 175, 17 L.Ed. 520 (1863) and *Douglas* v. *Pike County*, 101 U.S. 677, 25 L.Ed. 968 (1879) in support

of their view that a judicial construction of a state statute may constitute an unconstitutional impairment of a contract [Petition, p. 17]. This court has expressly rejected the reliance which Petitioners place on those cases. In *Tidal Oil Co.* v. *Flanagan*, 263 U.S. 444, 451, 44 Sup. Ct. 197, 199, 68 L.Ed. 382 (1924), referring to the above two cases among others, this court noted that "the fact that it has been necessary for this court to decide the question [that judicial decisions do not violate the impairment clause] so many times is evidence of persistent error in regard to it." Thus, in repeated instances where the issue has been presented on appeal, this court has dismissed for want of a substantial federal question. *See, A.M. Klemm & Sons* v. *City of Winter Haven*, 309 U.S. 638, 60 S. Ct. 810, 84 L.Ed. 993 (1940); *Hibbard, Spencer, Bartlett & Co.* v. *City of Chicago*, 308 U.S. 505, 60 S. Ct. 114, 84 L.Ed. 433 (1939); *Secor* v. *Fulton*, 293 U.S. 517, 55 S. Ct. 574, 79 L.Ed. 1533 (1934). We respectfully urge the court to do the same with this Petition.

CONCLUSION

For all of the foregoing reasons, Respondents Morris C. Gurnee and Moshe Weinreich, *et al.*, pray that the writ of certiorari be denied.

Respectfully submitted,

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